Supreme Court of Kentucky

2015-SC-000462

COMMONWEALTH OF KENTUCKY,
ENERGY AND ENVIRONMENT CABINET — APPELLANT

v.

ON REVIEW FROM COURT OF APPEALS
NOS. 2013-CA-001695 AND 2013-CA-001742
FRANKLIN CIRCUIT COURT NO. 11-CI-01613

KENTUCKY WATERWAYS ALLIANCE,
SIERRA CLUB, VALLEY WATCH,
SAVE THE VALLEY, AND
LOUISVILLE GAS AND ELECTRIC COMPANY — APPELLEES

REPLY BRIEF FOR APPELLANT, ENERGY AND ENVIRONMENT CABINET

Christopher Fitzpatrick
Anna Girard Fletcher
Office of General Counsel
Energy and Environment Cabinet
300 Sower Boulevard
Frankfort, Kentucky 40601
(502)782-6948 (telephone)
(502) 564-4245 (fax)
chris.fitzpatrick@ky.gov

CERTIFICATE OF SERVICE

It is hereby certified that copies of this Brief for Appellant were mailed this 28th day of June, 2016 to Joe F. Childers, Joe F. Childers & Associates, The Lexington Building, 201 W. Short St., Ste. 300, Lexington, KY 40507; Nathanial Shoaff, Andrea Issod, Sierra Club Environmental Law Program, 2101 Webster St., Suite 1300, Oakland, CA 94612; Sheryl G. Snyder, Jason P. Renzelmann, Frost Brown Todd LLC, 400 W. Market Street, 32nd Floor, Louisville, KY 40202-3363; John C. Bender, R. Clay Larkin, Dinsmore & Shohl, LLP, Lexington Financial Center, 250 W. Main Street, Ste. 1400, Lexington, KY 40507; Amy Feldman, Franklin Circuit Court Clerk, Franklin County Courthouse, 222 St. Clair St., Frankfort, KY 40601; and Hon. Phillip Shepherd, Chief Circuit Judge, Franklin County Courthouse, 222 St. Clair St., Frankfort, KY 40601; Samuel P. Givens, Jr., Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; and Hon. Janet L. Stumbo, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601.

Attorney for Appellant

STATEMENT OF POINTS AND AUTHORITIES

INTRODUCTION

This Reply Brief addresses certain assertions in Appellees' Counterstatement of the Case concerning the Cabinet's practices for permit renewals, and refutes arguments made in Appellees' Brief. First, however, the Cabinet wishes to illuminate a fundamental difference in how the parties are reading 40 C.F.R. 125.3(c). In the Cabinet's view, the case turns on this difference.

As this Court is aware from the prior briefs, EPA has provided states, by regulation, several methods for imposing technology-based effluent limitations in permits for water discharges from steam electric power plants. The first method is to impose effluent limitations by "[a]pplication of EPA-promulgated effluent limitations . . . to dischargers by category or subcategory." 40 CFR 125.3(c)(1). The Cabinet reads that language just as it is: where there is an EPA-promulgated ELG, the limitations in the ELG are to be applied to "dischargers by category." The permit limits are the effluent limitations required by the ELG.

The key difference in how Appellees read this provision is shown on page 5 of their brief, where they state: "Where there is no applicable national guideline, or where national guidelines 'only apply to certain aspects of the discharger's operation, *or to certain pollutants*....'" (Underline is by the Cabinet; italics are in original.) When the Cabinet issued the challenged permit to LG&E, an EPA-promulgated ELG for the *Steam Electric Power Generating Point Source Category* was in full force and effect.[1] So, the question raised by the underlined portion of Appellees' statement is this: *to what* must the

[1] The title of the ELG the Cabinet applied here was *Steam Electric Power Generating Point Source Category; Effluent Limitations Guidelines, Pretreatment Standards and New Source Performance Standards*, 47 FR 52290 (November 19,1982).

national guideline be applicable for it to be used to impose effluent limitations? EPA's regulation states the answer clearly: it must be applicable to "dischargers by category." If an existing ELG is applicable to a category of discharger, then permit limits are to be imposed by application of those effluent limitations. Even the Court of Appeals acknowledged as much when it stated at the outset of its analysis: "[i]t is uncontested among the parties that a case-by-case, best professional judgment analysis is not required under the Act when a nationwide ELG sets limits for a category of dischargers."[2]

However, when Appellees answer the question "*to what* must the national guideline be applicable for it to be used to impose effluent limitations," they have a different answer. For Appellees, the national guideline must be applicable *not* to a category of discharger, but it must be applicable *to individual pollutants contained in that discharge*. The Appellees contend that if the national guideline does not establish limitations for every individual pollutant in that discharge, then it is "not applicable" to those pollutants. Since under Appellees' reading the ELG is "not applicable" here, then the state was required to craft case-by-case limits addressing every pollutant in Trimble's wastestream.

The problem with Appellees' position is their misguided reading of 40 C.F.R. 125.3(c)(1). For numerous reasons[3] discussed in the Appellants' briefs, Appellees'

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[2] Court of Appeals Opinion at p.14.

[3] These reasons include (1) the impossibility of identifying and rationally limiting every pollutant in a wastestream [Cabinet's Petition for Rehearing at p.4, note 5]; (2) the CWA's goal of national uniformity in the application of ELGs [Cabinet's Brief at p.8] (3) that Appellees' reading would nullify 40 CFR 125.3(c)(1) [Cabinet's Brief at p. 15]; (4) that no other court has interpreted this provision to require a state agency to set limits by BPJ where an EPA-promulgated ELG is applicable to the category of discharge, while many courts have ruled that BPJ limits are no longer to be created once national ELGs are in place [Cabinet's Brief at pp. 10-11]; (5) the impossible burden placed on states and industry under the lower courts' rulings [Cabinet's Brief at p. 9]; and (6) that the lower courts substituted their own interpretation of the applicable regulation for the Cabinet's, giving no deference to the Cabinet's interpretation of this regulation that it is charged to administer [Cabinet's Brief at p. 10].

interpretation is wrong, and the lower courts' rulings adopting Appellees' flawed reading should be overturned.

The Cabinet is not ignoring the rest of the quote from page 5 of Appellees' brief, which then points to another method for imposing technology-based effluent limitations: the method set forth in 40 C.F.R. 125.3(c)(3). However, that subsection only comes to bear "[w]here promulgated effluent limitation guidelines *only apply* to certain aspects of the discharger's operation, or to certain pollutants...." (Emphasis added.) Here, the flaw in Appellees' reading becomes even more apparent. They read subsection (c)(1) and subsection (c)(3) effectively to mean the same thing: if an ELG is not "applicable to" (in subsection (c)(1)) individual pollutants in the wastestream, or if the ELG "only applies to" (in subsection (c)(3)) certain pollutants in the wastestream (but not to others), then the Cabinet must use Best Professional Judgment (BPJ) to establish case-by-case limits for those other pollutants. In this way, Appellees read subsection (c)(1) *entirely out of the regulation*, collapsing it into subsection (c)(3).

If there were any remaining doubt that Appellees' interpretation is flawed, one need only read subsection (c)(2) to confirm it. That subsection provides that effluent limitations may be imposed "[o]n a case-by-case basis...*to the extent that EPA-promulgated effluent limitations are inapplicable*" (emphasis added). Again, ELGs are applied to dischargers by category, so it is only when an ELG is inapplicable to a category of discharger that effluent limitations may be imposed under BPJ. As the Cabinet discussed in its Appellant's brief and Petition for Rehearing,[4] ELGs are "applicable" unless they have been remanded or withdrawn. The ELG for discharges from steam electric power plants was not remanded or withdrawn when the Cabinet

[4] See Cabinet's Brief at pp. 5-7; Cabinet's Petition for Rehearing at pp. 2-5.

applied it to establish effluent limits for LG&E's Trimble permit. Therefore, it was applicable to establish permit limits and the use of BPJ was not required. This is the only reading of 40 C.F.R. 125.3(c) that gives full effect to, and harmonizes, each of its subsections.

I. Response to Assertions in Counterstatement of the Case

In their Counterstatement of the Facts, Appellees first state that "the Cabinet's custom is not to renew expired water discharge permits on time...."[5] Kentucky regulation allows for (and anticipates) the administrative continuance in force of KPDES permits until the effective date of a new permit. The continuance is condition on several factors, such as the permittee's submittal of a timely and complete application.[6]

Second, Appellees contend that since EPA's new ELG became effective January 4, 2016, "it has no bearing on the failure of the Cabinet to set the proper limits in Trimble's permit."[7] It has a bearing to the extent that in the new ELG, EPA has determined *not* to require dischargers like Trimble to meet Best Available Technology (BAT) limits for arsenic, mercury, selenium, and other such pollutants until after November 1, 2018, as Appellees acknowledge in their brief.[8] If in the new ELG EPA *still* has not required a state to impose BAT limits for these metals on plants like Trimble for, at a minimum, two more years, then it is even clearer that Kentucky was not required to set those limits using BPJ in 2010 when issuing the permit that is currently effective.

The Hanlon Memo does not require a different conclusion. By its own terms, the Hanlon Memo is not to be applied retroactively to permits issued before the date of the

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[5] Appellees' Brief at p1.
[6] See 401 KAR 5:060, Section 2(4).
[7] Appellees' Brief at p.6.
[8] Appellees' Brief at p.9.

memo, as the Trimble permit was. Also, it is expressly a guidance document. Kentucky cannot regulate based on guidance documents but instead must regulate by statute or regulation. Finally, in the new ELG, EPA made no reference to the Hanlon Memo. If EPA had wanted states to conduct BPJ analysis to set limits for these discharges before the limits in the ELG become effective, EPA surely would have said so. Instead, EPA deferred the application of BAT limits for the metals in wastewater from the Trimble plant for several more years.[9]

ARGUMENT

Appellees take issue with Appellants' discussion of certain cases. Regarding the *NRDC* case out of California,[10] Appellees seek to distinguish the conclusions reached in the decision from the arguments made here, but provide no textual support for their conclusions. First, Appellants do not contend that the facts are identical to the matter at hand, as that decision hinged in part on whether the EPA has a mandatory duty to promulgate ELGs in the first place. Second, Appellees' conclusion ("Under the Clean Water Act, EPA has a mandatory duty to establish and update the national guidelines, *and* state permitting agencies have a mandatory duty to take a close look at the particular application and set case-by-case limits for pollutants and processes that are not covered by existing guidelines under 40 C.F.R. §125.3.")[11] is not founded in the cited case, nor do they cite any additional law to support the conclusion. Further, the record here clearly reflects that existing guidelines cover the category of discharge in this matter. Though

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[9] Under 40 C.F.R. § 123.44(c)(7), EPA also had the opportunity to comment on and object to the draft permit for Trimble before it was issued. While EPA did initially express concern about Trimble's use of water from the no-discharge ash pond as source water for a flue gas desulfurization unit, once the Cabinet addressed that concern in a revised draft permit, EPA reviewed that draft and notified the Cabinet it had no objection to the permit conditions.

[10] *NRDC v. EPA*, 437 F. Supp. 2d 1137 (C.D. Cal 2006).

[11] Appellees' Brief at 20.

the Appellees cast aspersions on the date of issuance of the ELGs and the time which has elapsed since, the fact remains that ELGs are in place for the category of discharge. A state is not required, and perhaps is not even empowered, to set limits when national guidelines exist. The cited case makes this abundantly clear when, in its ample examination of the legislative history, it finds:

> Once national limitations are established, state permit programs are required to apply them in order to achieve the statutory goal of uniform effluent limitations for "similar point sources with similar characteristics."[12]

As discussed above, EPA established an ELG for the category of discharge applicable to the Trimble plant. The court went on to say, "[w]e know of no legal authority stating that the practice of issuing permits based on 'best professional judgment' was to be ongoing.'"[13] Thus, though the facts were somewhat distinguishable from the facts of the matter at hand, the conclusions reached by the court directly apply to the facts of the present case and support the Cabinet's position.

The Appellees also cite an Indiana Office of Environmental Adjudication decision that "affirmed" the permitting authority's obligation to use BPJ even when ELGs apply.[14] First, it is without question that this decision of the Indiana Office of Environmental Adjudication, on par with this state's Cabinet's Office of Administrative Hearings, is not mandatory authority for this Court, and it is a stretch to consider it persuasive authority. Further, the decision cited by the Appellees is not even a decision on the merits of the

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[12] *NRDC* at 1160-1161, citing Senate Consideration of the Conference Report, Oct. 4, 1972, 1 1972 Legislative History, at 172.
[13] Id at 1160.
[14] Appellees' Brief at 21, citing *In the Matter of: Objection to the Issuance of NPDES Permit No. IN0001759 to Indiana Kentucky Electric Corp. Clifty Creek Plant*, Cause No. 12-W-J-4541 (attached to Appellee's Brief at App. 10.)

case or the issues at hand. It is a denial of a Motion for Summary Judgment stating that questions of fact still remain as to the appropriateness of the Indiana Department of Environmental Management's (IDEM) actions in issuing the objected to permit, and these questions, by Appellees' own admissions, remain unresolved.[15] Finally, the affirmation language which the Appellees rely on states merely that "until such time as the U.S. EPA promulgates rules that establish BAT for steam electric power generating point sources, the IDEM must use its best professional judgment to determine whether a specific technology-based treatment is the appropriate BAT for a facility."[16] The Cabinet notes that this conclusion rests in a section which discusses whether the IDEM erred in establishing the specific type of BAT treatment used to treat the plant's discharge to reach required limits, NOT whether the state was required to use BPJ to set those limits in the first place. As discussed extensively above, the EPA *has* established *limits* for steam electric power generating point sources, and thus the Cabinet is bound to apply those limits. Thus, the Cabinet's assertion still stands that "no other court has interpreted 40 CFR 125.3(c) to require a state agency to set case-by-case discharge limits where an EPA-promulgated ELG is applicable."[17] The Appellees' cited Indiana administrative case is not a final determination on the merits, and the discussion in that case is not even applicable to this matter. In fact, the only relevant conclusion that it draws is that the IDEM properly applied the steam electric power generating ELGs when it imposed limits on only total suspended solids and oil and grease.[18]

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[15] See Appellee's footnote no. 17 on page 21.
[16] *In the Matter of: Objection to the Issuance of NPDES Permit No. IN0001759 to Indiana Kentucky Electric Corp. Clifty Creek Plant*, Cause No. 12-W-J-4541, at page 13.
[17] Cabinet's Brief at p. 11.
[18] See *In the Matter of: Objection to the Issuance of NPDES Permit No. IN0001759 to Indiana Kentucky Electric Corp. Clifty Creek Plant*, Cause No. 12-W-J-4541, at page 11.

Next, Appellees claim that the Act's general definition of "applicable standards and limitations" trumps EPA's use of the terms "application" and "applicable" in 40 C.F.R. 125.3(c), and thus would defeat the Cabinet's argument that an ELG is applicable unless it has been remanded or withdrawn. Appellees speculate that there may be reasons other than remand or withdrawal of an ELG that could cause it to be "inapplicable" as the term is used in that regulation. No such speculation is warranted, appropriate, or supported by any reference to case law or rules for regulatory construction. The more specific regulation EPA constructed for the specific process for states to use to establish technology-based effluent limits controls over a general definition outside of that context.[19]

Appellees also maintain that the question of whether water quality-based effluent limitations are required "is an entirely separate analysis; therefore, whether or not the Cabinet conducted a water quality analysis has nothing to do with the question in this case of whether it applied the appropriate technology-based limits."[20] The Cabinet highlights the history of its own water quality analysis to show that the metals in the discharge would not be effectively unregulated, even if the lower courts believed that an ELG did not establish limits. The Cabinet applied additional layers of environmental protection when it added conditions to the Trimble permit requiring collection and reporting of data on metals in the waste stream, and requiring Whole Effluent Toxicity testing by LG&E.[21] Notably, the Indiana Department of Environmental Management in

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[19] See *United States v. Kumar*, 750 F.3d 563, (6th Cir., 2014); *United States v. Perry*, 360 F.3d 519, (6th Cir., 2004) at p. 535 "One of the most basic canons of statutory interpretation is that a more specific provision takes precedence over a more general one."

[20] Appellees' Brief at p.23.

[21] See LG&E Trimble County Generating Station, Permit Fact Sheet (A.R.Dkt. No. 30), at page 5.

the "Clifty Creek" case cited by the Appellees also elected to set no limits, but rather require reporting and monitoring for the metal pollutants in the discharge wastestream.[22]

Finally, the lower courts substituted their own interpretation of 40 C.F.R. 125.3(c) for the Cabinet's interpretation, overlooking well-established case law. The Cabinet's interpretation of this regulation — which it is charged to administer — is entitled to great deference when its interpretation does not contravene the law. While the Cabinet does not believe 40 C.F.R 125.3(c) is ambiguous, the parties' divergent readings may cause the Court to conclude that it is. As this Court has ruled:

> If a statute is ambiguous, the courts grant deference to any permissible construction of that statute by the administrative agency charged with implementing it. *See Bd. of Trustees of the Judicial Form Retirement Sys. v. Attorney General*, 132 S.W.3d 770, 786–87 (Ky.2003) citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844–45, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).[23]

The Cabinet's construction is consistent with the overwhelming body of case law to consider whether case-by-case limits are required, or even appropriate, once EPA promulgates an ELG that is applicable to the category of discharge. The lower courts erred in substituting their interpretation of the governing regulation for the Cabinet's interpretation.

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[22] See *In the Matter of: Objection to the Issuance of NPDES Permit No. IN0001759 to Indiana Electric Corp. Clifty Creek Plant*, Cause No. 12-W-J-4541, at p. 12.

[23] *Pub. Serv. Comm'n of Kentucky v. Com.*, 320 S.W.3d 660, 668 (Ky. 2010).

CONCLUSION

For all the foregoing reasons, the rulings of the Court of Appeals and the Franklin Circuit Court should be REVERSED, and the Order of the Secretary should be AFFIRMED.

Christopher Fitzpatrick